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**ORIGINAL**

February 24, 2004

**EX PARTE**

**VIA FAX AND HAND DELIVERY**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St. S.W.  
Washington, DC 20554

**RECEIVED**

**FEB 24 2004**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: *The Point One Proposal To Reaffirm The Existing ISP Exemption***

*Petition for Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services  
Are Exempt From Access Charges, WC Docket No. 02-361*

Dear Ms. Dortch:

UniPoint Enhanced Services, Inc. d/b/a PointOne ("PointOne"), by its counsel, and pursuant to Section 1.1206(b) of the Commission's rules hereby submits this ex parte presentation on the above-referenced petition of AT&T seeking a declaratory ruling that phone-to-phone IP Telephony services are exempt from access charges ("*AT&T's Petition*").

Pursuant to Section 1.1206(b) of the Commission's rules, two (2) copies of this letter and presentation are being submitted for filing.

Respectfully submitted,



Dana Frix  
Kemal Hawa

Chadbourne & Parke LLP  
Counsel for PointOne

Enclosures

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Dear Ms. Dortch:

UniPoint Enhanced Services, Inc. d/b/a PointOne ("PointOne"), by its counsel, and pursuant to Section 1.1206(b) of the Commission's rules hereby submits this ex parte presentation on the above-referenced petition of AT&T seeking a declaratory ruling that phone-to-phone IP Telephony services are exempt from access charges ("*AT&T's Petition*"). PointOne submits that in the event the Commission declares that some or all of AT&T's phone-to-phone IP Telephony service is subject to access charges under Section 69.5 of the Commission's rules, the Commission should, at the same time, explicitly reaffirm the enhanced/information service provider exemption ("*ISP Exemption*") from access charges,<sup>1</sup> and clarify that true next-generation IP Telephony/Communications providers whose network architectures satisfy the *PointOne Test* set forth below continue to be subject to the *ISP Exemption*. If the Commission fails to do so, the likely unintended result will be the assessing of access charges on dial-up narrowband Internet connections and services, a result that would have the same deleterious affects as would a tax on the Internet.

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<sup>1</sup> See *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 ¶ 345 (1997) ("*Access Charge Reform Order*") and *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-722 (1983).

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***The PointOne Test***

It is well established that the purpose of a declaratory ruling is to terminate a controversy or remove uncertainty<sup>2</sup> by clarifying an agency's interpretation of the existing state of the law.<sup>3</sup> There are two salient aspects of the current law surrounding IP Telephony and access charges: (i) Section 69.5, which requires that interexchange carriers pay access charges to local exchange carriers for the use of their networks, and (ii) the *ISP Exemption*, which exempts enhanced and information service providers from access charges.

To the extent the Commission decides to deny *AT&T's Petition* on the grounds that AT&T's service is subject to access charges under the current state of the law, PointOne urges the Commission to also clarify that any entity that satisfies the *PointOne Test* will continue to be subject to the *ISP Exemption* unless and until the Commission decides otherwise after completion of a rulemaking proceeding.

Under the *PointOne Test*, IP Telephony/Communications providers that qualify for the ISP Exemption must, at a minimum, reflect the following characteristics:

- They must offer services that involve computer processing, interaction with customer-supplied information, or interaction with stored information
- They must utilize 100% IP and VOIP network elements
- They must purchase services and facilities as end users (like ISPs do)
- They must pay taxes and surcharges on the facilities they purchase as end users
- They must convert 100% of their voice traffic into IP regardless of the equipment used
- They must have the ability to bridge IP networks to the PSTN and other networks

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<sup>2</sup> See 47 C.F.R. § 1.2 (2002) and 5 U.S.C. § 554(e) (2002).

<sup>3</sup> See *British Caledonian Airways v. Civil Aeronautics Board*, 584 F.2d 982, 990 (D.C. Cir. 1978) ("The feature which distinguishes declaratory orders and other interpretative rulings from those legislative rules which must conform with the procedures established by the APA for rulemaking is not the extent of their effect, but rather that the order or ruling instead of creating new law serves only to clarify and state an agency's interpretation of existing statute or regulation.") (citations omitted).

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***Adoption of the PointOne Test Will Promote the Goals Behind the ISP Exemption***

The Commission's goal in adopting the *ISP Exemption* was to promote the continuing development of the Internet and information services, and to preserve the vibrant free market that exists on the Internet, free from government regulation.<sup>4</sup> Through the *ISP Exemption*, the Commission sought to promote the deployment of next-generation enhanced networks, and the rollout of new and innovative enhanced service offerings.<sup>5</sup> The Commission has stated that had it not adopted the *ISP Exemption*, the pace of development of Internet and other services would not have been so rapid over the last twenty years.<sup>6</sup> The Commission recognized that the access charge regime contains non-cost-based rates and inefficient rate structures, and that mandating the existing price structure for these services would disrupt the still evolving information services industry.<sup>7</sup>

With respect to IP Telephony specifically, the Commission recently reaffirmed these goals in its *Pulver.com Decision*.<sup>8</sup> *AT&T's Petition* and the *Pulver.com Decision* have come to be viewed as bookends in the IP Telephony debate. The service at issue in the *Pulver.com Decision* involved computer-to-computer IP-Based communications services provided over broadband connections, not over the PSTN. *AT&T's Petition* involves phone-to-phone IP Telephony that traverses the PSTN.

It has been widely reported that, unlike the service at issue in the *Pulver.com*, the Commission may not view AT&T's phone-to-phone IP Telephony service as a service that qualifies for the *ISP Exemption*, primarily because the mere injection of some amount of IP into AT&T's network does not fundamentally alter the nature of AT&T's network or the manner in

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<sup>4</sup> See *Access Charge Reform Order* at ¶ 344.

<sup>5</sup> See *id.* at ¶¶ 344-48.

<sup>6</sup> See *id.* at ¶ 344.

<sup>7</sup> See *id.* at ¶ 345.

<sup>8</sup> See *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 at ¶ 18 (rel. Feb. 19, 2004) ("*Pulver.com Decision*").

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which AT&T transmits and routes its traffic, and is insufficient to change the regulatory paradigm to which AT&T is subject.<sup>9</sup> Since the Commission appears to be of the view that AT&T's network is not a true next-generation network for which the *ISP Exemption* from access charges was intended, the Commission seems poised to declare that under current law, that with regard to at least some of its traffic, AT&T must pay access charges on phone-to-phone IP Telephony services under Section 69.5.

PointOne maintains a true next generation enhanced IP network. PointOne enables any-to-any communication, meaning that PointOne's network can be used to transmit and route traffic between any origination and termination devices, whether they be phones, computers, PDAs, wireless devices, or any other medium. With respect to calls originating and/or terminating over the public switched telephone network or PSTN, PointOne's network architecture is virtually indistinguishable from a traditional dial-up ISP. As such, PointOne's network is precisely the type of network for which the *ISP Exemption* was designed: "the fact that the information service [PointOne] is offering happens to facilitate . . . voice communication, among other types of communications . . . does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service."<sup>10</sup>

By way of illustration, dial-up Internet traffic to an ISP typically originates on an end user's computer, travels over the PSTN (normally the incumbent LEC's loop, switching and transport facilities), and is commonly routed to a CLEC for termination over facilities the ISP purchases from the CLEC. When ISPs purchase facilities, they do so as end users, and pay all applicable taxes, fees, and surcharges as an end user would. Access charges would not apply to such traffic, though in the example provided reciprocal compensation may have to be paid to the CLEC involved by the originating LEC.

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<sup>9</sup> See Statement of Commissioner Jonathan S. Adelstein, Concurring in Part and Dissenting in Part, *IP-Enabled Services*, Notice of Proposed Rulemaking (2004) (Approving in Part, Concurring in Part), *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45 (2004) (Concurring in Part and Dissenting in Part).

<sup>10</sup> *Pulver.com Decision* at ¶ 12.

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If, in the example above, PointOne were to replace the ISP, the traffic would follow precisely the same transmission path, and PointOne would still not be obligated to pay access charges on the traffic since voice calls originating from a computer are not considered to be subject to access charges under the *Stevens Report*<sup>11</sup> and the Commission's recent *Pulver.com Decision*.<sup>12</sup> Under current law, the same would be true even if a phone were used to originate the IP Telephony call: "long-distance calls handled by ISPs using IP Telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption."<sup>13</sup>

PointOne has maintained in the current policy debate that it would be neither technically nor legally sound to draw regulatory policy lines around a mere device such as a phone. Thus, PointOne believes that *AT&T's Petition* is substantially overbroad. PointOne is concerned, however, that if the Commission were to deny *AT&T's Petition*, true IP Telephony/Communications networks, such as that of PointOne, may be inadvertently swept up into the decision and subjected to access charges, when it is clear that under the current state of the law they are not so subject. (Numerous commenters have filed pleadings discussing the *Stevens Report* and other decisions describing the Commission's historical treatment of IP Telephony, and there is no need to do so separately here).

Again, to the extent that *AT&T's Petition* is denied, it should be denied because AT&T's network is not a true next-generation network for which the *ISP Exemption* from access charges was intended. The reason for this is that (as AT&T itself agrees) notwithstanding any IP that AT&T may inject into the middle of a call, its network is largely the same circuit-switched network that AT&T has traditionally used to transmit and route its interexchange traffic.<sup>14</sup>

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<sup>11</sup> See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 91-92 (1998).

<sup>12</sup> See FCC News Releases, *FCC Rules that Pulver.com's Free World Dialup Service Should Remain Free From Unnecessary Regulation*, Feb. 12, 2004.

<sup>13</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶ 6 (2001).

<sup>14</sup> See Letter from Patrick H. Merrick, Esq., AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 02-361, CC Docket Nos. 02-33, 95-20, 98-10, at 7 (filed Sept. 22, 2003).

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There is widespread agreement throughout the telecommunications industry that IP Telephony should be subjected to minimal regulation. There is disagreement, however, as to which services and providers should be eligible for such minimal regulation, and which should be subjected to more traditional common carrier regulation. To the extent the Commission decides to deny *AT&T's Petition*, PointOne urges the Commission to be cautious in ensuring that true next-generation IP Telephony/Communications providers are not inadvertently implicated. Intercarrier compensation for IP Telephony traffic is certainly an important issue, and one that is sure to be addressed by the Commission during the course of the pending rulemaking proceeding concerning IP Telephony.<sup>15</sup> PointOne and other true IP Telephony/Communications providers, however, are currently subject to the *ISP Exemption* from access charges, and should continue to be unless and until the Commission decides otherwise.

***Conclusion***

For the foregoing reasons, PointOne urges the Commission, to the extent it decides to deny *AT&T's Petition*, to reaffirm the *ISP Exemption* for IP Telephony/Communications providers whose networks satisfy the *PointOne Test*.

Respectfully submitted,



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Kemal Hawa

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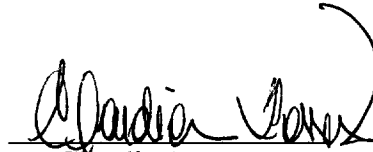
cc: Service List

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<sup>15</sup> See FCC News Release, *FCC Moves to Allow More Opportunities for Consumers Through Voice Services Over The Internet*, Feb. 12, 2004.

### CERTIFICATE OF SERVICE

I, Claudia F. Torres, hereby certify that true and correct copies of the foregoing Ex-Parte Presentation were sent by hand delivery and fax to the following individuals on this 24th day of February, 2004.



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